

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL

To be argued by
SPIROS A. TSIMBINOS

B
P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2012

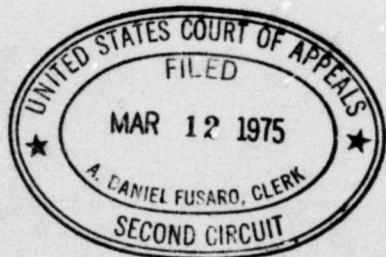
UNITED STATES ex rel. JOSEPH MONTY,
Petitioner-Appellant,
-against-

ADAM F. McQUILLAN, Warden, Queens House
of Detention for Men, Long Island City
Branch, New York, N.Y.,

Respondent-Respondent.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF AND APPENDIX
FOR PETITIONER-APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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: UNITED STATES ex rel. JOSEPH MONTY, :
: :
: Petitioner-Appellant, : DOCKET NO.
: : 75-2012
: -against- :
: :
: ADAM F. McQUILLAN, Warden, :
: Queens House of Detention :
: for Men, Long Island City :
: Branch, New York, N. Y. , :
: :
: Respondent-Respondent. :
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Preliminary Statement

This is an appeal from an order of the United States District Court, Eastern District of New York, (Judd, J.) rendered on December 19, 1974 dismissing the petitioner's application for a writ of habeas corpus with respect to his incarceration by the New York State Department of Correction following his conviction in the State Court of the crimes of bribe receiving and receiving rewards for official misconduct, under sections 200.10 and 200.25 of the New York State Penal Law, and sentencing him to an indeterminate term of up to four years. The petitioner has been incarcerated since September 16, 1974.

Questions Presented

1. Whether the petitioner was denied due process and equal protection of the law under the Fourteenth Amendment where the Governor of the State of New York by specific designation appointed a particular judge to hear the petitioner's case while other defendants in the same county where the petitioner was tried, by court rules, had judges assigned to their cases by lot and random selection?

2. Whether the petitioner's constitutional right of confrontation was violated by the allowance during the trial of substantial hearsay testimony?

STATEMENT OF FACTS

History of the Case

On September 19, 1972 the Governor of the State of New York by Executive Order established the office of Special State Prosecutor with jurisdiction to conduct investigations and proceedings against any and all corrupt acts and omissions by public officials "arising out of or connected with the administration of criminal justice in the City of New York." By said order the five elected District Attorneys of the City of New York were superseded in this particular area and in conjunction with the appointment of the Special Prosecutor, Judge John M. Murtagh, Justice of the Supreme Court, New York County, was specifically designated by the Governor to hear all cases arising out of prosecutions by the Special Prosecutor.

On June 1, 1973 an indictment was obtained by the Special Prosecutor's office against the appellant, an employee of the Queens County District Attorney's office, containing various counts of bribe receiving, receiving reward for official misconduct, and grand larceny. Prior to trial the grand larceny charges were dismissed by the court and a trial on the remaining counts commenced on October 16, 1973. After trial by a jury, the

appellant was found guilty of one count of bribe receiving and one count of receiving reward for official misconduct under sections 200.10 and 200.25 of the New York State Penal Law. Thereafter on March 18, 1974 the appellant was sentenced to an indeterminate term of imprisonment not to exceed four years. The Appellate Division of the New York State Supreme Court affirmed the appellant's conviction of July 29, 1974 and leave to appeal to the State Court of Appeals was denied on August 5, 1974. A petition for a writ of certiorari to the United States Supreme Court was denied on December 16, 1974 and on December 19, 1974 the Honorable Orrin Judd, Judge of the United States District Court for the Eastern District, denied petitioner's application for a writ of habeus corpus in a nine page decision. A Certificate of Probable Cause certifying that the issues in the case at bar were worthy of consideration by this Court was signed by the Honorable Judge Judd on January 9, 1975.

The Evidence at the Trial

Joseph Monty while serving as the Chief Rackets Investigator of the Queens County District Attorney's Office had been granted by Avis Rent-A-Car the complimentary use of vehicles. The area in contention during the trial narrowed down to the point as to whether as required by the provisions of the Penal Law sections under which Monty was convicted his use of the vehicles was related to an agreement or understanding that he provide special law enforcement services to Avis, outside the scope of his normal and legitimate duties, or as Monty contended the use of the vehicles arose as a result of a personal friendship with Fred Massaro, an official of Avis (R 53, 907). *

Proof As to the Alleged Special Services Performed for Avis and Monty's Alleged Illegal Activities.

The prosecution contended that Monty performed "special services" for Avis in that he used his office to collect bad debts for the company, he arranged to cancel police alarms on vehicles which had been recovered

* R - Refers to Record on Appeal presented in the Appellate Division, Second Department, New York State Supreme Court, and submitted as an exhibit to this Court.

and he ran criminal record checks for Avis with respect to prospective employees (R 53-59). The evidence presented in support of said contention were that Monty had helped process two cases against customers of Avis who had passed bad checks. Ray Bonini, a prosecution witness and an official of Avis stated that he called Monty in the Spring of 1970 regarding a Mrs. Eleanor Modica who had continually passed bad checks to his company. In June of 1970 Bonini was advised that Mrs. Modica was in Monty's office and he was asked to come down to press formal charges (R 493).

According to Bonini, Modica wanted to pay the debt if Avis would drop the charges. Bonini agreed to this on behalf of Avis and so advised Monty (R 493). Modica eventually made good on the bad checks and no formal charges were processed against her (R 704). According to Murray Seliger, another prosecution witness, and a detective investigator in the Queens District Attorney's Office, the practice in the office regarding cases similar to Modica's was to call the parties in to see whether restitution could be obtained before a criminal proceeding took place (R 626). Bonini further

testified that Monty didn't ask anything from Avis for his work on the Modica matter nor did he pay Monty anything (R 511). The second "collection" matter brought up by the prosecution involved a Walter Halpern, another individual who had issued bad checks to Avis. According to Charles Napolitano, another prosecution witness and an area manager for Avis, he contacted Monty in October of 1970 regarding the matter (R 200). Monty assigned the investigation of the matter to Murray Seliger one of the detective investigators in the office, who in turn contacted Halpern regarding the situation. According to Seliger, Halpern refused to discuss the matter and hung up on him. Monty thereafter related this information to Napolitano and advised him to appear before the Grand Jury to press formal charges against the defendant. Napolitano did this on March 8, 1971 and an indictment was obtained against Halpern. Halpern subsequently pleaded guilty to a reduced charge and was sentenced to a conditional discharge, one of the conditions ordered by the sentencing judge being that full restitution in the amount of \$2,309 be made to Avis (R 309, 311, 304, 808).

During the trial Selinger testified that once Monty had assigned him to the Halpern investigation Monty did nothing to interfere with the case and gave him no special instructions regarding the matter (R 677, 682, 688). Monty never in fact appeared in or near the Grand Jury room when the matter was being presented nor was he present in court at the time of Halpern's sentencing (R 304, 689, 911). Halpern himself stated that he never saw Monty before (R 831). Napolitano stated that in proceeding with the case through the District Attorney's office he inquired about the possibility of restitution but was told by Monty that he could give no assurance on that, only that it was possible (R 302, 303). According to Napolitano, Monty never told him that he had anything to do with the fact that restitution was ordered to be paid by the judge (R 310). Seliger also testified in this regard that in his dealing with Avis he was never asked by Avis representatives to get restitution as a condition for continuing the prosecution (R 680). With respect to the prosecution's contention regarding the cancellation of police alarms John Held, station supervisor of Avis, testified that

one day he accompanied his boss Fred Massaro to Monty's office to cancel a police alarm (R 528). Richard Zaia, another Avis manager also stated that he communicated with Massaro regarding cancelling police alarms and that Massaro had told him he could get it done through the Queens District Attorney's office, but he did not mention who (R 546). The prosecution also introduced a letter forwarded by Monty to the Police Communications Bureau requesting the cancellation of seven alarms (People's X 37). Monty in his testimony acknowledged sending the letter to Police Communications and in receiving five calls regarding cancelling alarms for Avis during the years of his service in the District Attorney's office. Avis, according to Zaia's testimony, had some 350 alarms cancelled in all during the one year period of his employment as car control manager (R 583-587) and only twelve of these had been placed by Monty (R 583-587). No evidence other than Zaia's own opinion that police procedure required alarms to be cancelled in person at the precinct of recovery (R 538) was introduced with regard to police procedures regarding the cancellation of alarms. Charles Napolitano and Salvatore Giuffrida, two other prosecution witnesses, in fact stated that

cancellation of alarms could be made in person or by telephone call to the police department (R 122, 438). The Police Department in fact never questioned or complained about Monty's written request for cancellation of the alarms but accepted it and duly acted upon it.

With regard to the appellant's actions regarding criminal record checks of prospective Avis employees, Monty stated that he had on three occasions given the names of prospective Avis employees to a member of his staff for a check. He did not know whether police department records or his own department records were used to find out the information requested (R 1000). Gail Rachlin, a representative of Avis Personnel Department, testified that she had called Monty for name checks only on special occasions when she was particularly suspect of a prospective employee and was afraid for personnel safety. As for example, an employee who might work with women during the evening hours (R 731-732). Detective Angelo Albanese, of the New York City Police Department Identification Section, testified that law enforcement officials were entitled to use information from his office for legitimate law enforcement purposes (R 840-1).

During the trial various Avis officials admitted that Monty refused to accept any money for the "alleged special services rendered" and in fact the appellant specifically paid not only for his own lunch but often the lunch of Avis officials on the occasions that he happened to meet them (R 368, 511, 613, 724). The count of the indictment alleging payment to Monty of \$500. by Napolitano was specifically rejected by the jury (R 1374).

Proof As To An Agreement and Understanding Between Monty and Avis.

Joseph Monty was alleged to have entered into a specific agreement and understanding to perform special services for Avis through one Fred Massaro, an area manager of Avis and a friend of Monty's. Fred Massaro did not testify at the trial and was considered to be unavailable (R 53, 1068). Charles Napolitano, another of Avis' managers, testified however over defense objection that Massaro told him of Monty's arrangement with Avis and that Monty could be helpful in placing cancellations of alarms and in collections of bad debts (R 127-133, 288). Similarly, Salvatore Giuffrida also

an official of Avis stated that Massaro told him about an arrangement with Monty and suggested that the company continue the arrangement (R 360-361). Raymond Bonini, Richard Zaia, and other Avis executives also testified that Massaro made comments to them involving the appellant (R 471, 547), and Robert Elkins testified that Massaro told him Monty could be utilized for dropping alarms and to furnish him with complimentary cars when needed (R 765).

All of these witnesses with the possible exception of Guiffrida, had no personal knowledge of any agreement between Monty and Avis and only testified as to what Massaro told them (R 474, 475, 546). Guiffrida in the only testimony coming elsewhere than from Massaro's missing lips, stated that at a restaurant meeting with Monty in 1971

"Monty specifically related to his past relationship with Avis Rent-A-Car and expressed a desire to continue that relationship" (R 367).

Giuffrida later testified however that his personal knowledge of that situation was extremely limited and gathered largely from what Massaro and others had told him (R 382, 436).

Monty's Testimony

Joseph Monty testified that he was a former New York City Police Officer and had served as the Chief Rackets Investigator in the Queens District Attorney's Office from 1967 to 1972 (R 887). He acknowledged receiving complimentary cars from Avis Rent-A-Car but stated that this was a result of a personal friendship with Fred Massaro, an official of Avis. Monty further stated that he eventually paid \$2,000. for a car which he purchased from Avis (R 496, 386) soon after Massaro left the company. Monty acknowledged cancelling police alarms for Avis on five occasions, and requesting criminal record checks on three occasions (R 998, 999), and being aware of the Halpern and Modica investigations. He denied, however, that any of these activities were outside the scope of his official duties and he denied any agreement or understanding that his activities were related to or in return for the use of Avis cars (R 1000).

POINT I

THE PROCEDURES ESTABLISHED BY
EXECUTIVE ORDER AND UNDER
WHICH THE APPELLANT WAS TRIED
ARE DISCRIMINATORY AND VIOLATE
DUE PROCESS AND EQUAL PROTECTION
OF THE LAW.

On September 19, 1972 then Governor Nelson Rockefeller by Executive Order in conjunction with Section 63 of the Executive Law of New York, established the office of Special State Prosecutor under the direction of Maurice Nadjari. The governor simultaneously under Article 27 of the State Constitution and Section 149(1) of the New York Judiciary Law, specifically designated Judge John M. Murtagh, Justice of the Supreme Court, New York County, to hear all cases in the City of New York arising out of prosecutions brought by the special prosecutor. It is appellant's position that the specific designation of a particular Judge to try all of the cases initiated by the Special Prosecutor is discriminatory and violates both due process and equal protection of the law under the Fourteenth Amendment. In the County of Queens by specific court rules and in both the Federal Courts for the Eastern and Southern Districts, the assignment of judges to try cases is specifically designated to

be a random selection where the judges are picked by lot. (See Rules of the Supreme Court, Queens County, Section 796.5; Individual Assignment and Calendar Rules for the Eastern District, Rule 2; for the Southern District, Rules 4 and 11). In New York it appears that court rules which are legally adopted have the force and effect of statutes and are binding on tribunals to which they are applicable. In re Matter of Moore, 108 N.Y. 280; In re Pequenos', 177 Misc. 223. The importance of assigning judges by lot has been recognized by the courts and even under Federal statutes provision is made for the disqualification of a judge upon the submission of an affidavit alleging bias or prejudice. See 28 U.S. Code 144 and U.S. v. Garrison, 340 F. Supp. 952 (D.C.E.C. La. 1972). In Garrison, the court stated all cases should be assigned to judges on a random basis and it should never be of any moment to a judge as to whether or not he sits on a particular case.

The specific designation of Judge Murtagh to handle Mr. Monty's case and all other cases initiated by the Special Prosecutor thus violates the Rules of the Supreme Court, Queens County, and leads to a denial of due process and equal protection of the law. It has been continually held that constitutional guarantees of due

process and equal protection call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons. Griffin v. Illinois, 351 U.S. 12. In Griffin, supra, the Supreme Court citing Chambers v. Florida, 309 U.S. 227 and Yick Yo v. Hopkins, 118 U.S. 356, stressed that the central aim of our entire judicial system was that all persons charged with crimes must so far as the law is concerned stand on an equality before the bar of justice in every American Court. It has been consistently held that criminal laws of the state must be applied equally to all defendants. The court in Loper v. Beto, 440 F.2d 934 (5th Cir., 1971), rev on other grounds 405 U.S. 473 (1972), stated at page 941:-

"It is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions."

The procedure under which JOSEPH MONTY was tried both from the point of view of the Special Prosecutor and the specific Judge who tries all of the Special Prosecutor's cases was different from that involving other defendants tried in Queens County. The arrangement under which Mr. Monty's case was prosecuted by its very nature violates equal protection and due process of law. The same Governor who

appointed the Special Prosecutor specifically designated the trial judge and both of these officials have participated together in the indictment and trial of some 110 persons to date.

Under the procedure established Justice Murtagh has the responsibility to empanel and charge extraordinary panels of the Grand Jury when and where they are needed, to act as legal advisor to the Special Grand Jury, to give legal instructions when necessary, to pass upon arrest warrants, search warrants and eavesdropping applications, to receive indictments voted upon by said Grand Jurys and to review documents to determine the efficiency of evidence. In addition, to decide on pre-trial motions, set bail and to preside at the trial of all cases.

The procedure in question is thus substantially different from that in U. S. v. Keane, 375 F. Supp. 1201 (N.D. Ill., 1974); U. S. v. Simmons, 476 F.2d 33 (9th Cir., 1973); and U.S. v. Torbert, 496 F.2d 154 (9th Cir., 1974) relied on by the court below. In Keane and Simmons a judge was assigned on a one case basis in instances where a trial was anticipated to be long and protracted, and where the initial judge had become ill. Further, the judges in those cases sat by virtue of their initial appointment by the president and approval by the congress,

and were specifically designated to sit in those cases by the presiding judge of the district court. Their ties and relationship to the prosecution was thus in no way analogous to the situation in the case at bar. In the instant situation the appointment of a special prosecutor by the governor followed by the appointment of a specific judge by the same governor to hear the cases coming before the special prosecutor violates the principle of separation of power and checks and balances which the founding fathers considered so important to the preservation of democratic government.

The procedure in question is similarly quite different from that in the cases of People ex rel Saranac Land and Timber Co. v. Supreme Court, 220 N.Y. 487 and People v. Davis, 67 Misc. 2d 14 (Sup. Ct., Ontario Cty. 1971) where judges were appointed to hold extraordinary terms on a one case basis. It should also be noted that Judge Cardozo in his decision in the Saranac Land and Timber case specifically pointed out that the relief sought was a writ of prohibition to prevent the term from acting on preliminary proceedings. The judge indicated that such relief at that point was premature.

The procedure in the case at bar is also distinguishable from those situations where, in sparsely populated judicial districts, only one judge would ordinarily be sitting. The distinction to be drawn is that in the case at bar the judge is not available to all parties by virtue of a random selection and does not serve a similarly situated class of defendants. On the contrary, Judge Murtagh was specifically designated by the People of the State of New York through the authority of the Governor and is thus a judge actually picked by one of the parties. Respondent's citation of cases in the court below indicating that the Supreme Court has at times sanctioned local variations in the administration of criminal justice does not support his position that the procedure in question is constitutional. He himself acknowledges in his papers below that there must be some legitimate State purpose to support the variations in question. In Baxstrom v. Herold, 283 U.S. 107 (1966) at page 111, the Supreme Court stated:-

"That although equal protection does not require that all persons be dealt with identically it does require that a distinction made have some relevance for the purpose which the classification is made."

In the case at bar there is absolutely no basis to support the designation of a specific judge. There is no claim that any of the other numerous judges sitting on the Supreme Court of the State of New York if selected on a random basis by lot, as it is done in all other cases, could not properly sit on prosecutions initiated by the Special Prosecutor. Respondent has failed to show any logical or legitimate reason why he has the right to have his cases tried before a particular judge. The only inference to be drawn is that he is the beneficiary of preferred treatment.

A careful analysis of the record in the case at bar reveals that the pro-prosecution bias of the trial judge which would naturally arise out of the special relationship established, did in fact manifest itself in specific occurrences throughout the petitioner's trial. For example, from the very beginning the appellant was forced to trial despite defense counsel's assertions that additional time was needed to prepare an adequate defense and to attempt to locate FRED MASSARO, the major

witness against the appellant, who the People claimed was unavailable (R 54a, 56a, 59a).

It is interesting to note that although the Court and the prosecutor attempted to convey an impression that they were long ready to proceed to trial in the instant case, the Court's decision on the preliminary motions to dismiss and inspect the Grand Jury's minutes and for a bill of particulars, had not been made until the very eve of trial and defense counsel was supplied with the District Attorney's answer to the bill of particulars only on the day jury selection was to begin (R 46a, 59a, 64a, 11). The record also reveals that the judge in the case at bar had an ex parte conference with the Special Prosecutor, Mr. Nadjari, and with Stephen Sawyer, the assistant who tried the case, in which it was admitted that the general work of this investigation was discussed (R 9).

Further, during the trial the trial judge refused a request that the jury be polled with regard to reading any newspaper articles unless they were specifically informed that this was the request of the defense (R 414). Throughout the trial the Court also made references to defense counsel indicating that his questions were "grossly improper" stating that he should not try to put words in the mouths of witnesses and

otherwise generally conveying partiality to the prosecution (R 279, 292).

It should also further be noted that the Special Prosecutor was attempting to obtain the testimony of the appellant, JOSEPH MONTY, for use in a subsequent trial of the Queens County District Attorney THOMAS J. MACKELL. In this regard Monty's trial was conveniently held before the trial of Thomas Mackell and the record below contains an affidavit of defense counsel, JEFFREY ATLAS, that the trial judge actively attempted to obtain the petitioner's cooperation in the Mackell and other pending cases and threatened to throw the book at him if he did not cooperate (R 1381, 1382, 1509-1514).

The severe sentence imposed upon the appellant despite his otherwise unblemished record is indicative of the fact that the judge made good his threat. Based upon the foregoing incidents defendant moved on three separate occasions to have the trial judge disqualify himself (R 12a, 9, 1509).

The pro-prosecution bias of the judge in question is further amply illustrated by the fact that several of the convictions initiated by the Special Prosecutor have been reversed by appellate courts within the last few months based largely upon reversible error and

excessive zeal exhibited by the trial judge. Thus, in a recent case the Appellate Division of the Supreme Court of the State of New York, First Department, emphasized that the charge of Judge Murtagh when read as a whole was prejudiced, in that it emphasized the strength of the prosecution's case in derogation of the requirement to give balanced instructions to the jury in a criminal trial (People v. Richard Bell, 45 A.D. 2d 362 (1974)).

In another recent opinion of the Appellate Division, the Second Department criticized the failure of Judge Murtagh to allow defense cross-examination as to whether the prosecution witness had entered into a deal with the prosecutor in return for his testimony. (People v. Norman Levy, New York Law Journal, February 24, 1975).

The right to a fair and impartial Judge is a right protected by the Constitution of the United States. See Tumey v. State of Ohio, 273 U.S. 510 (1927); Matter of Murchison, 349 U.S. 133 (1950). In Murchison, the United States Supreme Court stressed the importance of the impartiality of a judge and stated "that every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies

the latter due process of law." The American Bar Association Standards relating to the function of a trial judge also stresses the importance of impartiality on the part of the judiciary. Section 1.5 A.B.A. Standards 1972. See also 48 C.J.S., Section 72.

In the instant case the special procedure established and the actual incidents which occurred offends not only the appearance but the very essence of impartiality. The appellant was clearly discriminated against and denied the right to a fair trial in violation of his rights to due process and equal protection of the laws.

POINT II

PETITIONER'S CONSTITUTIONAL
RIGHT OF CONFRONTATION WAS
VIOLATED BY ALLOWING HEARSAY
TESTIMONY.

Despite the Special Prosecutor's contention, both during the trial and throughout the previous appellate proceedings, that the evidence of appellant's guilt was overwhelming, a careful review of the record reveals that on the contrary, proof as to the key element in the case, i.e. an agreement or understanding to violate a lawful duty in return for special services, comes about totally from what Fred Massaro is alleged to have told other Avis officials (R 127-133, 288, 360, 361, 471, 547, 765). The only other independent evidence regarding an alleged agreement was Guiffrida's testimony that he met Monty at a luncheon meeting "where Monty related his past relationship and expressed a desire to continue the relationship" (R 367). Even Guiffrida's testimony in this respect appears to rely in great part on what Massaro previously told him, and Guiffrida acknowledged that his personal knowledge of the situation was limited (R 382, 436). The Respondent's continual assertion that proof of guilt

is overwhelming comes from lumping together evidence that Monty used Avis' cars (which is really undisputed) with Massaro's statements. When the necessary and essential evidence is separated from the mass, the true quantum of proof appears. After all, the mere use of Avis' vehicles by Monty would not establish proof of the crimes for which the appellant was convicted. Otherwise, clearly similar situations as for example acceptance of gifts from now Vice-President and former Governor Rockefeller by State officials would clearly call for similar indictments by the Special Prosecutor, an action which has not been taken. Thus, clearly the essence of the crime of which Monty was convicted involves the presence of an agreement or understanding to violate a public trust. In this regard the record is bare as to how a public trust was violated, and any claim of such an agreement came only from the lips of a missing witness, Fred Massaro. Under the circumstances, the allowance of this hearsay testimony, over vigorous defense objection, was totally improper and constituted a denial of the appellant's constitutional rights. Pointer v. Texas, 380 U.S. 400; Bruton v. U.S., 391 U.S. 123; Dutton v. Evans, 400 U.S. 74.

The paucity of additional evidence to verify the alleged statements made by Massaro in the case at bar, clearly distinguishes the instant case from the Supreme Court decision in Dutton v. Evans, 400 U.S. 74. In the Dutton case, supra, the Supreme Court affirmed a conviction by a 5-4 decision, of a Georgia defendant where hearsay testimony was allowed as to what an alleged accomplice of the defendant had told to a prosecution witness. The Supreme Court in the very beginning of its decision stated however at page 79: -

"We start by recognizing that this Court has squarely held that the Sixth Amendment right of an accused to confront the witness against him is a fundamental right made obligatory on the States by the Fourteenth Amendment."

The Court then proceeded to observe at page 89: -

"Decisions of this Court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement."

The five members of the majority, in reaching their decision to affirm, clearly proceeded on the fact that the occurrence constituted harmless error due to the fact that proof of guilt was overwhelming. The State, in fact, in Dutton, supra, presented some twenty witnesses,

including an eye witness, as to defendant's participation. As was stated at page 87, the case did not involve evidence in any sense "crucial to the prosecution or devastating to the defense and contained sufficient indicia of reliability." Considering the four votes for reversal in Dutton plus the reasons for affirmance indicated by the five other members of the court, as outlined above, it appears clear that the admission of hearsay statements in the case at bar constitutes a violation of the defendant's right of confrontation.

Both the court below and respondent attempt to uphold the admission of the hearsay testimony in question on the basis of the hearsay exception relating to statements of a co-conspirator made in furtherance of a conspiracy. This very court, however, in U.S. v. Puco, 476 F.2d 1099, 1102, recognized that the confrontation clause was not merely a codification of the hearsay rule and a balancing of rights and interests was required. This court stated at page 1102:-

"Although careful to avoid placing evidentiary rules in a constitutional strait jacket the Court has emphasized the importance of subjecting evidentiary statements to challenges by cross-examination of the declarant during at least some stage in the judicial proceeding against a defendant."

This court, in U.S. v. Puco, 476 F.2d 1099 (2nd Cir., 1973) then proceeded to consider the amount and reliability of other evidence in determining whether a defendant's denial of his right to confrontation required a reversal of his conviction. Relying on Dutton, supra, this court examined the factual situation to determine the reliability of the supportive evidence and whether the hearsay testimony could be considered either crucial to the prosecution or devastating to the defense.

In the case at bar, as indicated earlier, almost all of the evidence presented against the defendant to show the crucial element in the case, to wit, that an agreement or understanding had been reached, stemmed from statements of prosecution witnesses as to what the out-of-court witness, Fred Massaro, had said. This evidence was certainly devastating to the appellant, and the reliability of the alleged statements was unsupported by other evidence.

The case at bar is thus similar to that of Park v. Huff, 493 F.2d 923 (5th Cir., 1974) where the court reversed and remanded. The court there stated:-

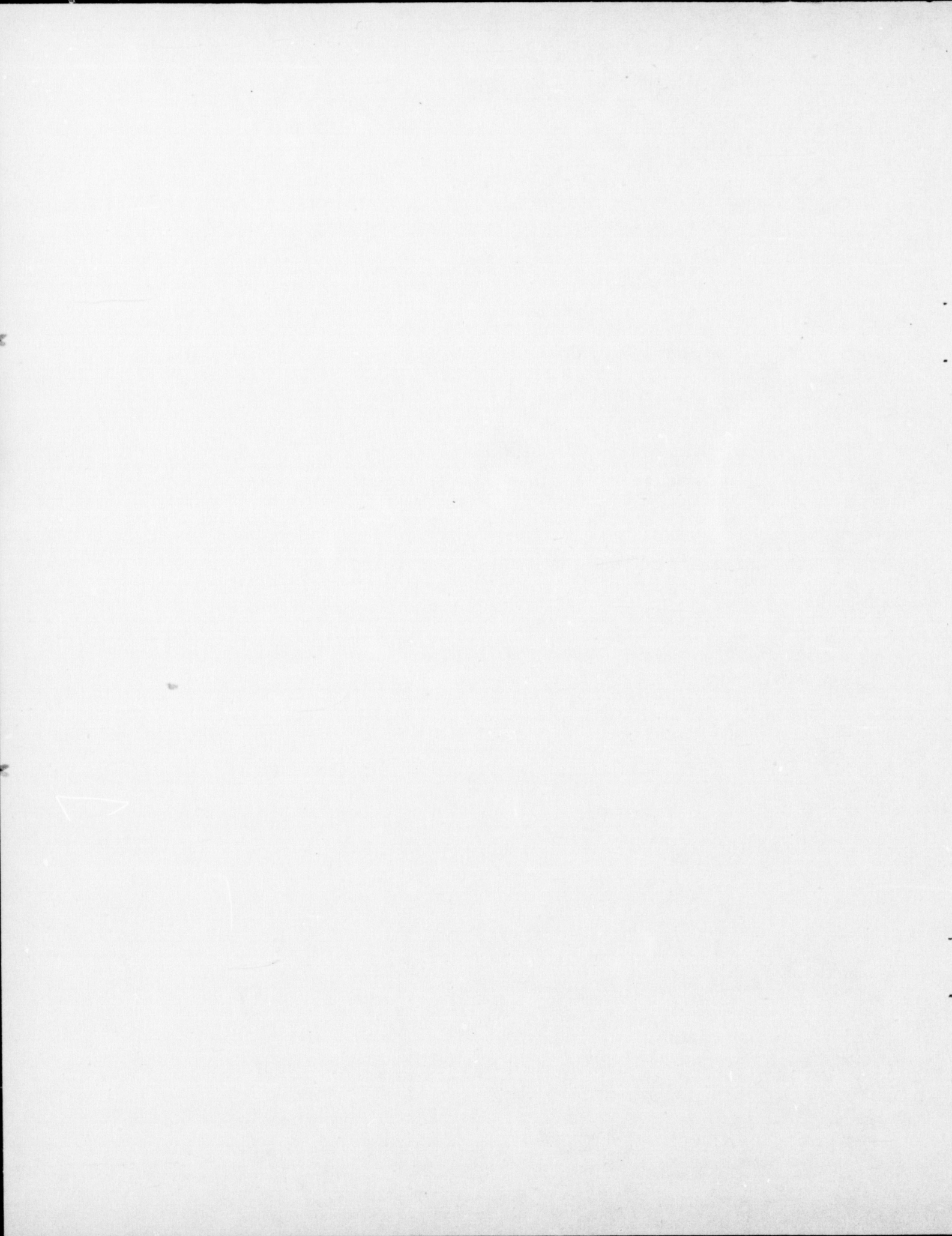
"That Seay's testimony was admissible under Georgia's co-conspirator exception does not, however, assure that the testimony was properly admissible when viewed against the constitutional standard of the confrontation clause of the sixth amendment. Proper admission of evidence under an exception to the hearsay rule does not relieve a federal court considering a state criminal conviction from the responsibility for reviewing all the facts of the case in light of governing federal constitutional principles. . . . the Supreme Court emphasized that the hearsay rule and the confrontation clause are not congruent. Dutton v. Evans, 400 U.S. 71, 81-82; Favre v. Henderson, 464 F.2d at 363." (p. 928)

"Considerations of elemental fairness and of the 'accuracy of the truth determining process' demand that we prevent the substitution of devastating, unreliable hearsay testimony for live testimony and an opportunity for cross-examination by the accused. The importance of cross-examination is in direct relation to the damaging quality of the hearsay. The prosecution may not hide a weak case behind a hearsay shield to obtain a conviction." (p. 933)

It is interesting to note that after the prosecution had introduced these hearsay statements of Fred Massaro over vigorous defense objections, they thereafter proceeded to attempt to draw an inference through cross-examination of the appellant that he, himself, might be responsible for the unavailability of Fred Massaro (R 1067-1071). This line of attack was

taken despite the fact that a stipulation had been entered into that Massaro was unavailable to both sides, and after the trial court had denied defense counsel an application for an adjournment for the purposes of attempting to locate Fred Massaro, who was then believed to be in Florida (R 54a).

The prejudice to the appellant by the allowance of the hearsay statements in question was substantial and clearly amounted to a denial of his constitutional right of confrontation.



CONCLUSION

THE APPELLANT WAS DENIED
SUBSTANTIAL CONSTITUTIONAL
RIGHTS IN THE STATE COURT
AND THE PETITION FOR A WRIT
OF HABEUS CORPUS SHOULD BE
GRANTED.

Respectfully Submitted,

SPIROS A. TSIMBINOS
Attorney for Petitioner-
Appellant
Office & P. O. Address
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 699-6110

March, 1975.

HABEAS CORPUS

DOCKET

**US
CLOSED
CLOSED**

ATTORNEYS

TITLE OF CASE

JOSEPH MONTY

For Plaintiff:

SPIROS A. TSIMB

vs.

PEOPLE OF THE STATE OF NEW YORK

125-10 Queens Blvd

Kew Gardens, N. Y.

- For Defendant: Tel: (212

For Defendant:

BASIS OF ACTION:

JURY TRIAL CLAIMED

ON

[illegible]

ABSTRACT OF COSTS

RECEIPTS, REMARKS, ETC.

[illegible]

4C 1337

JOSEPH MONTY vs. PEOPLE OF THE STATE OF NEW YORK

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
-13-74	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	1 JS5
-16-74	Before JUDD, J. Hearing on order to show cause, etc Case called Attorneys for both parties present WRIT DENIED and DISMISSED WITHOUT prejudice.	
16-74	ORDER TO SHOW CAUSE FILED WITH THE ORDER ENDORSED BY JUDD, J., on back of same. DISMISSING WRIT without prejudice to renewal, etc. (SO ORDERED - See order dated Sept.16,1974,etc.)	2
0-4-74	BY JUDD, J. ORDER TO SHOW CAUSE FILED why a writ of habeas corpus should not be issued directing that the body of JOSEPH MONTY be produced, etc. (returnable Oct. 25, 1974 at 10:00 A.M.)	3
0-4-74	Memorandum of law filed.	4
0-22-74	Affidavit of Service filed of a copy of order to show cause, etc.	5
0-23-74	BRIEF OF RESPONDENT HEREIN FILED.	5
0-23-74	Answer of respondent filed to the Order to show cause.	7
0-25-74	Before JUDD, J. Case called. Both sides present. Motion argued. Decision Reserved.	
10-30-74	Supplemental Brief of Respondent filed.	8
10-8-74	Petitioner's Reply Brief filed.	9
12-20-74	Brief of Respondent filed.	10
12-20-74	Supplemental Brief of Respondent filed.	11
12-19-74	BY JUDD, J. MEMORANDUM and ORDER FILED. ORDERED that the PETITION BE DISMISSED. (See Memo., etc.) Copy mailed out to Spiros A. Tsimbinos, et al, by the secretary to JUDD, J.	12
2-27-74	JUDGMENT FILED that the petitioner take nothing and the petition is DISMISSED.	13
1-9-75	Letter of Spiros A. Tsimbinos, Esq., filed dated Jan.7,1975 addressed to JUDD, J.	14
0-9-75	BY JUDD, J. CERTIFICATE OF PROBABLE CAUSE FILED. copies sent out of Chambers.	15
1-3-75	NOTICE OF APPEAL FILED. (Proof of Service thereon)	16
1-13-75	Copy of Notice of Appeal was on this day mailed to Clerk U.S.C.A.	
1-13-75	Copy of instructions re preparation of record, etc., together with forms C and D were on this day mailed to Spiros A. Tsimbinos, Esq., 125-10 Queens Blvd., Kew Gardens, N.Y. 11415, etc.	
<p>ATTEST</p> <p><i>[Signature]</i> CLERK</p>		

DOCKET ENTRIES

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES ex rel. JOSEPH MONTY, :

Petitioner, :

74-C-1337

- against - :

ADAM F. McQUILLAN, Warden, Queens
House of Detention for Men, Long
Island City Branch, New York, N.Y.,

: December 19, 1974

Respondent. :

-----X
Appearances:

SPIROS A. TSIMBINOS, Esq.
Attorney for Petitioner

HON. MAURICE H. NADUARI
Deputy Attorney General
Attorney for Respondent

By: STEPHEN P. SAWYER, Esq.
Special Assistant Attorney General
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

This habeas corpus proceeding is brought by a
petitioner, who has been convicted in the Supreme Court,

Queens County, for receiving bribes and receiving rewards for official misconduct. He attacks the assignment of a particular judge to try the case, and errors at the trial.

Background of Facts

Governor Rockefeller by Executive Order No. 57 dated September 19, 1972, directed the Attorney General to appear before an Extraordinary Special and Trial Term of the Supreme Court, Queens County, to inquire into corrupt acts and omissions by public servants or former public servants in the County of Queens, relating to the enforcement of law or the administration of criminal justice. The Governor designated Mr. Justice John M. Murtagh of the Supreme Court, New York County, to hear all cases arising out of the Extraordinary Special and Trial Term. Attorney General Lefkowitz appointed Maurice H. Nadjari as Deputy Attorney General to handle prosecutions.

Petitioner was the Chief Rackets Investigator in the Queens County District Attorney's office. The substance of the charges against him was that he received free use of Avis rental cars. It was charged that he assisted Avis in the collection of debts owed to it by threats of prosecution, and

that he gave help to Avis in other ways.

Legal Issues

Petitioner asserts first, that the designation by the Governor of a particular justice to try all cases brought by the Special Prosecutor violates the requirements of due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution.

Petitioner also raises issues concerning trial errors, particularly the refusal of the Judge to poll the jury containing a certain newspaper article, and permitting testimony concerning the statement of a co-conspirator.

Statutory Provisions

The Nadjari appointment was made pursuant to Section 63(2) of the Executive Law of New York, which states that:

The attorney-general shall: . . .

2. whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement;

The appointment of a judge to preside at such an Extraordinary Term is specifically authorized under Article

VI, Section 27 of the New York Constitution, which provides:

The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the time and place of holding the term and the justice who shall hold the term. . . .

The constitutional provision is implemented by Section 149(1) of the New York Judiciary Law, which specifies that the Governor must name the justice who shall hold or preside at the Extraordinary Term.

Discussion of Authorities

Petitioner asserts that the designation of a particular judge by the Governor violates the Rules of the Queens County Supreme Court, which, like the Individual Assignment Rules of this court, provide for random assignment of cases to judges. This raises merely a question of state law. No authority is given for the suggestion that the Rules of the Supreme Court in a particular county would have greater weight than a provision of the state constitution. It is necessary therefore to consider the due process and equal protection arguments.

1. This appears to be the first time that the Governor's appointment of a justice to hold an Extraordinary

MEMORANDUM AND ORDER

Term has been challenged in the federal court.

The power has been exercised for more than half a century. The usual practice has been for the Governor to designate a justice from a district different from that in which the court is held, a practice which he followed in this case.

A challenge to the practice, as applied to a civil case, was rejected long ago by the New York Court of Appeals. People ex rel. Saranac Land Timber Co. v. Supreme Court, 220 N.Y. 487 (1917 - Cardozo, J.). Other New York cases have repeatedly sustained the exercise of jurisdiction of criminal cases at extraordinary terms, in a variety of circumstances, People v. Davis, 67 Misc.2d 14, 322 N.Y.S. 2d 927 (Sup. Ct. Ont. Co. 1971); (denying motion to dismiss indictment); People ex rel. Luciano v. Murphy, 160 Misc. 573, 290 N.Y.S. 1011 (County Ct. Clinton Co. 1936 - Croake, J.) (denying habeas corpus after conviction); People v. Gillette, 191 N.Y. N.Y. 107, 118 (1909) (affirming conviction); See Matter of McIntyre v. Sawyer, 179 App. Div. 535, 538 166 N.Y.S. 631 (1st Dept. 1917) (finding inadequate publication of notice).

The Saranac case was cited with approval by the

United States Supreme Court in Johnson v. Manhattan Railway Co., 289 U.S. 479, 501 n.15, 53 S.Ct. 721, 729 n.15, in holding that Senior Circuit Judge Manton had authority to assign himself to hold - district court when he deemed the public interest required, and to select equity receivers for Interboro Rapid Transit Company. The criticisms which the court made of Judge Manton's wisdom in so acting (289 U.S. at 504-05, 53 S.Ct. at 730-31) have no application here.

The Judicial Conference of the United States on October 29, 1971 recommended special assignment in particular cases and called for a program for the prompt disposition of "protracted, difficult or widely publicized cases." An attack on the constitutionality of a district court order implementing this resolution was rejected by the Executive Committee of the District Court for the Northern District of Illinois in United States v. Keane, 375 F. Supp. (201 N.D. Ill. 1974). On request of the United States Attorney, and without notice to the defendant, the chief judge of the district had identified the case as one that would be protracted, difficult and widely publicized and designated Judge Decker to try the case, instead of following the local rule for random assignment of judges in

MEMORANDUM AND ORDER

civil and criminal cases. The court held (375 F. Supp. at 1204):

As the defendant concedes, due process does not accord him a right to have a judge assigned to his case on a random basis. Nor does it require a hearing on the issue of whether defendant's case will be protracted, difficult or widely publicized.

Due process does require that criminal defendants be accorded a fair trial before an impartial judge. But a defendant has no vested right to have his case tried before any particular judge, nor does he have the right to determine the manner in which his case is assigned to a judge.

Similarly in United States v. Simmons, 476 F.2d 33, 35 (9th Cir. 1973), the reassignment of a case to a specific judge was upheld against the contention that the defendant had an absolute right to a random selection of a judge under the local rules. See also United States v. Torbert, 496 F.2d 154, 156-57 (9th Cir. 1974).

No substantial charge of actual bias is made against Mr. Justice Murtagh. The general rule is that questions whether it would be improper to sit in a particular case are "a matter confided to the conscience of the particular judge." Weiss v. Hunna, 312 F.2d 711, 714 (2d Cir. 1963).

MEMORANDUM AND ORDER

cert. denied, 374 U.S. 853, 83 S.Ct. 1920, rehearing denied, 375 U.S. 874, 84 S.Ct. 37, quoting MacNeil Bros. Co. v. Cohen, 264 F.2d 186, 189 (1st Cir. 1959). Bias can be charged in any event only on a showing that it stems from an extrajudicial source and results "in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710 (1966).

The precedents on which petitioner relies are strikingly dissimilar from this case. In Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927), the trial judge was paid for his services only if the defendant was convicted, which raised a question of pecuniary interest that has no application here. In In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955), the trial judge had himself also operated as a "one-man grand jury"; there is no combination of prosecutorial and judicial roles in this case. The case of Loper v. Beto, 440 F.2d 934, 941 (5th Cir. 1971), vacated 405 U.S. 473, 92 S.Ct. 1014 (1972), relates only to the question whether a prisoner is entitled to a hearing on parole revocation.

New York law requires that an extraordinary term

MEMORANDUM AND ORDER

designated by the Governor shall "be conducted in accordance with the rules of law governing all other terms of court with the exception of the designation of the judge." Reynolds v. Cropsey, 241 N.Y. 389, 395 (1924). Therefore petitioner cannot claim that he is in any way deprived of equal protection of the law.

2. The trial errors complained of by petitioner do not support an application for habeas corpus.

The question whether Justice Murtagh should have polled the jury with respect to whether they had read certain news articles is a matter clearly within the discretion of the trial court.

The use of testimony concerning statements made by co-conspirator Fred Massaro is not a violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), as claimed by petitioner. On the contrary, it is a mere application of a long recognized exception to the hearsay rule, which has been most recently sustained by the Supreme Court in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), denying an attack based on the Bruton rule.

It is ORDERED that the petition be dismissed.

U. S. D. J.

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. JOSEPH MONTY,

Petitioner,

-against-

ADAM F. McQUILLAN, Warden, Queens
House of Detention for Men, Long
Island City Branch, New York, N.Y.

Respondent. ,

A memorandum and order of the Honorable
Orrin G. Judd, United States District Judge, having
been filed on December 19, 1974, the court having
determined that the petitioner was not deprived of
equal protection and the trial errors complained of
do not support an application for habeas corpus and
therefor dismissing the petition, it is

ORDERED and ADJUDGED that the petitioner
take nothing and the petition is dismissed.

Dated: Brooklyn, New York
December 27, 1974

s/ Lewis Orgel
Clerk

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D.N.Y.
DEC 27 1974

SERVICE OF 2 COPIES OF THE WITHIN

Brief ✓ COPY OF THE WITHIN PAPER
IS HEREBY ADMITTED. RECEIVED

MAR 12 1975

DATED:

NEW YORK CITY OFFICE

James H. Buckley
ATTORNEY GENERAL

Attorney for